IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 20, 2008

STATE OF TENNESSEE v. JARVIS ANTONIO CLEMMONS

Appeal from the Criminal Court for Davidson County
No. 2005-B-876 Cheryl Blackburn, Judge

No. M2007-02793-CCA-R3-CD Filed December 4, 2008

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and

JARVIS A. CLEMMONS v. STATE OF TENNESSEE

M2007-02791-CCA-R3-PC

The petitioner, Jarvis Antonio Clemmons, pleaded guilty in the Davidson County Criminal Court to four counts of aggravated robbery and two counts of attempted aggravated robbery and received a sentence of 33 years' incarceration. After the filing of a petition for post-conviction relief and an evidentiary hearing, the post-conviction court granted the petitioner a delayed appeal of his sentence but otherwise denied post-conviction relief. The petitioner now appeals from that judgment.[1] Discerning no error in the sentencing decision of the trial court or in the denial of post-conviction relief, we affirm. We remand the case to the trial court, however, for the entry of corrected judgments reflecting the correct aggregate sentence of 33 years.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed; Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. MCMULLEN, J., joined.

Ryan C. Caldwell, Nashville, Tennessee, for the appellant, Jarvis Antonio Clemmons.

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[1] The petitioner filed separate notices of appeal relating to the grant of a delayed appeal and the denial of post-conviction relief. Neither party moved to consolidate the cases; however, each party has filed only a single brief addressing both issues, and only a single trial court record was filed in this court. Under these circumstances, consolidation is appropriate. *See* Tenn. R. App. P. 16(b) ("When separate appeals involving a common question of law or common facts are pending before the appellate court, the appeals may be consolidated by order of the appellate court on its own motion or on motion of a party.").

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On April 25, 2005, a Davidson County Grand Jury returned a 29-count indictment charging the petitioner, Jarvis Antonio Clemmons, and four co-defendants with various counts of aggravated robbery, attempted aggravated robbery, and aggravated assault. The petitioner was charged in counts 13, 14, 16, 26, 27, 28, and 29 with seven counts of aggravated robbery and in counts 17 and 18 with two counts of attempted aggravated robbery. On April 6, 2006, the petitioner entered open pleas of guilty to four counts of aggravated robbery and two counts of attempted aggravated robbery. The facts, as presented by the State at the plea submission hearing, are as follows:

> Your Honor, first as to Counts 13 and 14, that occurred on December the 28th, 200[4].[2] A Mr. Enrique Canoco (phonetic) and Victor Legunis (phonetic) were in the parking lot of the Highlands Apartments at 4646 Nolensville Road here in Davidson County when they were approached by three male blacks. They got out of a black Ford Explorer, walked up, and robbed them at gunpoint. Mr. Canoco had $100 and his truck keys taken, and Mr. Legunis had $210 taken.
>
> Eventually [the petitioner] was arrested and admitted that he committed this particular robbery with co-defendant Frierson. He described the two victims and where they were and said he got about $60 in that case.
>
> Count 16 involves a robbery that occurred on December 25, 200[4], where Mr. David Alonzo (phonetic) was in the parking lot of the Turtle Creek Apartments at 121 Hickory Trace Drive when he was approached from behind by two male blacks. One of them put a handgun to his head, and the other one reached in his pocket and took his wallet that had $500 and his car keys.
>
> [The petitioner], when discussing his robberies, admitted that he committed this with Mr. Frierson. He described that Mr. Frierson pulled the gun on the victim while he, [the petitioner], took the money. And said they got about $600 during that robbery.

[2] Although the prosecutor noted dates in 2005, the indictment lists the date for counts 13 and 14 as December 28, 2004. The date in the indictment for count 16 is given as December 25, 2004.

> Count 17 and 18 occurred on December the 23, 2004, where Mr. Arzate Rio (phonetic) and Vincent Rio were getting out of their vehicle at 4700 Humber Drive here in Davidson County when they were approached by two male blacks. They told them to give them what they had. . . . [T]he victims refused. There was a struggle. Another car just drove by, and the suspects ran off. So that was not a completed robbery. That was the attempted robbery.
>
> [The petitioner] told the police that he remembered walking to Holly Hills and he and Mr. Frierson attempting to rob two people in the parking lot. He remembered the struggle with the victim and that a van drove by.
>
> Count 26 is the last one. That occurred on October 31st, 2004, when Mr. Cresenzio (phonetic) Hernandez was in the parking lot of the Turtle Creek Apartments. A silver colored Altima pulled up. Four male blacks jumped out and robbed the victim at gunpoint. They pushed him against a car. They demanded his money. He . . . said he didn't have any money, but they searched him and took his cell phone and around $1,600.
>
> [The petitioner] . . . said he remembered driving on this robbery and said he was [in] co-defendant White's car. He remembered one of the other suspects putting a gun to the victim's head and making him turn his head away. He advised they got around $1,000. . . . The other person involved was Mr. Frierson.

Based upon this statement of facts, the trial court accepted the petitioner's pleas and scheduled a sentencing hearing.

In the sentencing hearing held on August 9, 2006, the 21-year-old petitioner testified that he had "learned [his] lesson" and was "sorry" for his participation in the robberies. He stated that he was not a "bad person" and that he had avoided disciplinary action while incarcerated during the 19 months prior to the sentencing hearing. The petitioner also noted that his "past record, it ain't all that bad, a bunch of driving on suspended licenses, a simple assault, you know, simple possession." He testified that, during his pretrial incarceration, he had enrolled in Narcotics Anonymous, had completed a Life Skills class, and had been awarded a certificate in anger management.

The petitioner testified that he committed the robberies to support his drug habit, which included the daily use of marijuana, cocaine, and Ecstacy. He stated that he did not have a job at the time of the crimes because he could not pass a drug test. The petitioner testified that he completed two semesters at a two-year college before dropping out due to his drug use. The

petitioner stated that he had "never robbed nobody [sic] when [he] was sober." He classified his role in the robberies as that of an assistant, noting that he had never "pulled a gun on nobody" and that he generally acted as a driver or "would reach in their pocket and take the wallet out." The petitioner stated that he cooperated with the investigation, truthfully divulging the extent of his involvement as well as that of his co-defendants.

During cross-examination, the petitioner admitted falsifying a drug test to obtain employment at Walmart, which employment was later terminated when the petitioner was arrested for the offenses in this case. He also reported being previously employed by a business in LaVergne but related that he was fired from that job after being arrested for assault. The petitioner admitted that while on probation for the assault conviction, he was twice arrested for driving on a suspended license and that he became involved in the robberies. The petitioner testified that the gun used during the robberies was a "fake" but nevertheless claimed not to have held it during the crimes because he "knew how [the victims felt]" when the gun was pointed at them. The petitioner denied specifically targeting Hispanic victims, insisting that the group arrived at their targets by random selection.

The petitioner testified on re-direct examination that co-defendant Frierson was the leader in the commission of the crimes because "he [was] the one who was always pointing the gun" and he decided when the robberies would take place. The petitioner stated that Frierson would engage him in the crime by calling him on the telephone and asking if the petitioner "want[ed] to go touch something," which the petitioner described as "slang" for "you want to go rob somebody [sic]."

Julius Charles Turner Seay, Jr., the petitioner's former minister, testified that he met the petitioner when he served as an associate minister at Mount Hopewell Baptist Church where the petitioner and his family were members. Mr. Seay testified that the petitioner "seemed to have been a respectable young man" during the time they were acquainted. Mr. Seay noted that he had "never seen anything violent about the [petitioner]" and that it was his opinion that "there is some value in [the petitioner] that he should have an opportunity to redeem himself."

The petitioner's uncle, Dan Rudy Clemmons, testified that the petitioner's childhood was "pretty hard" because he was raised by a single mother who often asked Mr. Clemmons to help with her financial needs. Mr. Clemmons stated that he had also "conferred" with the petitioner "[s]piritually" on a number of occasions after his arrest and related that the petitioner is "very regretful that this happened." Mr. Clemmons recalled that the petitioner expressed a desire to "write a book about his life to [deter] other people from going through what he's had to go through." Mr. Clemmons testified that he intended to help the petitioner write the book "because [his] wife works for a religious Bible publishing company, and [they] would do what [they] could to help [the petitioner] out." Mr. Clemmons promised that, should the trial court impose the minimum sentence, he "would do a little bit more visiting of [the petitioner] to help him with the counseling and all that he needs."

Odessa Clemmons, the petitioner's mother, asked the court to impose the minimum sentence allowed under law because the petitioner is "not a bad boy." She testified that she and the petitioner "had hard times" and that the petitioner had seen his father "maybe" five times during his lifetime. Ms. Clemmons stated that she knew the petitioner was using drugs but lamented that she "couldn't watch him 24/7" because she worked two jobs to support the family. Ms. Clemmons recalled that the petitioner had "a few little problems in school . . . . so he went to Job Corp and got his GED. He came back home and was going to a little Nashville business college. And then [the co-defendants] start coming around, and that's when things went haywire." Ms. Clemmons stated that the petitioner lived with her during the time of the crimes but that she was unaware of his participation because "[i]t was just at night after [she went] to bed."

During the petitioner's incarceration, his girlfriend gave birth to their daughter, who was eventually left in the care of Ms. Clemmons. Ms. Clemmons stated that she missed the petitioner and that "now that he's got the baby . . . he would be a different person."

The presentence report, admitted as an exhibit at the sentencing hearing, established that the petitioner had four prior convictions for driving on a suspended license in addition to convictions for assault and casual exchange of a controlled substance. The report also established that the petitioner was on probation at the time he committed the offenses at issue in this case.

At the conclusion of the sentencing hearing, the trial court imposed a sentence of 11 years for each aggravated robbery conviction and a sentence of five years for each attempted aggravated robbery conviction. The trial court ordered that the sentences for counts 13 and 14 be served concurrently to each other; that the sentence for count 16 be served consecutively to counts 13 and 14; that the sentences for counts 17 and 18 be served concurrently to each other and to count 16; and that the sentence for count 26 be served consecutively to count 16. The aggregate term is, therefore, 33 years.

On November 15, 2006, the petitioner filed a petition for post-conviction relief alleging that his convictions were the result of an illegal seizure, that there was insufficient evidence to support his convictions, that his pleas were not knowing and voluntary, and that his trial counsel was ineffective for failing to adequately investigate the case, failing to inform him of weaknesses in the State's case, and coercing him into pleading guilty. The post-conviction court appointed counsel, and an amended petition for post-conviction relief was filed on March 30, 2007, alleging that the petitioner had been deprived of the effective assistance of counsel and that his guilty pleas were not knowingly and voluntarily entered.

In the evidentiary hearing held on July 11, 2007, the petitioner testified that trial counsel met with him only "three or four times" between the time he was retained by the petitioner and the entry of the petitioner's guilty pleas. The petitioner stated that, as a result of his consultation with trial counsel, he understood the charges against him and was aware of the potential penalties.

The petitioner testified that he asked counsel to call co-defendants Charles White and Keith Frierson as witnesses at the sentencing hearing to testify that the petitioner "was just driving the car and going in pockets." According to the petitioner, counsel never informed him that neither co-defendant White or co-defendant Frierson could be compelled to testify on his behalf at sentencing because charges related to the robberies were still pending against them at the time of the sentencing hearing. The petitioner insisted that he would not have pleaded guilty if he had known that the co-defendants would not be called as witnesses. The petitioner added that counsel could have moved for the admission of the videotaped statements of co-defendants White and Frierson to corroborate his testimony that he did not hold the gun during the robberies. The petitioner testified that he hoped that upon hearing this evidence, the trial court would *sua sponte* reduce his guilty pleaded convictions to facilitation offenses.

The petitioner complained that trial counsel did not tell him that he could appeal the sentence imposed by the trial court. He admitted, however, that he knew he could appeal the sentence, explaining, "Judge Blackburn had told me ahead of time that I would be able to." He stated that he asked trial counsel about an appeal but counsel did not respond.

During cross-examination, the petitioner admitted that the trial judge informed him during the plea submission hearing that the convictions would be permanent and conceded that he had no reason to believe that the trial court would reduce his convictions after the sentencing hearing. The petitioner insisted, "Well, if I would have knew [sic] then what I know now about the law, then I wouldn't . . . have pled guilty to the aggravated robbery, I would have took it to trial." According to the petitioner, he would have presented as a defense the fact that his role was primarily to drive and empty the pockets of the victims. The petitioner stated that counsel never explained the law of criminal responsibility.

Trial counsel testified that he met with the petitioner several times at the jail and at the courthouse. He insisted that he explained the concept of criminal responsibility to the petitioner both in person and in a letter detailing the State's theory of the case. Counsel explained that the petitioner never specifically asked that the co-defendants be called as witnesses at the sentencing hearing, noting that the two had discussed the statements of the co-defendants in relation to a number of pretrial issues. Counsel stated that he explained to the petitioner that having the co-defendants testify at the sentencing hearing would likely do more harm than good given the petitioner's repeated involvement in the violent offenses.

Trial counsel recalled that the petitioner rejected an offered agreement that included a 16-year sentence to be served at 30 percent, instead opting for a sentencing hearing and telling counsel, "[s]he's going to have to give it to me." Counsel recalled that despite counsel's repeated attempts to convince him otherwise, the petitioner believed that the judge "would have some kind of sympathy regarding the fact that he would testify that he never pulled a gun on the victims."

By a written order containing factual findings and legal conclusions, the post-conviction court denied post-conviction relief, finding that the petitioner had failed to establish by

clear and convincing evidence that his counsel performed deficiently or that his pleas were not knowingly and voluntarily entered. Despite these findings, the post-conviction court granted the petitioner a delayed appeal of his sentence, finding that it could "not conclude that the record clearly and unambiguously shows that the [petitioner] knew of his right to appeal and intended to waive it." In this appeal, the petitioner challenges both the sentencing decision of the trial court and the denial of post-conviction relief.[3]

I. Delayed Appeal

The petitioner asserts that the trial court erroneously applied two enhancement factors and erred by imposing consecutive sentences. When a defendant challenges the length and manner of service of a sentence, this court generally conducts a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006).[4] This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the defendant. *Id*. If the review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

In making its sentencing determination in the present case, the trial court, at the conclusion of the sentencing hearing, was obliged to determine the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant made in his behalf about sentencing, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(b); -103(5) (2006); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

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[3] This court has ruled that the post-conviction court is authorized to simultaneously grant a delayed appeal and deny post-conviction relief, thus permitting the concurrent consideration of both a direct appeal and a denial of post-conviction relief. *See State v. Billy Jackson Coffelt*, No. M2005-01723-CCA-DAC-CD, slip op. at 3 (Tenn. Crim. App., Nashville, Aug. 8, 2006); *State v. Ben Thomas Dowlen*, No. M2003-00508-CCA-R3-CD, slip op. at 2-3 (Tenn. Crim. App., Nashville, July 20, 2004), *perm. app. denied* (Tenn. Nov. 15, 2004).

[4] Although the petitioner committed his crimes prior to the June 7, 2005 effective date of the 2005 Amendments to the Sentencing Act, he submitted a written waiver of his ex post facto protections and expressed a desire to be sentenced under the current version of the Code.

A. Length of Sentence

The petitioner complains that the trial court should not have applied enhancement factors (1), that the petitioner has a previous history of criminal convictions in addition to those necessary to establish the sentencing range, and (8), that the petitioner, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community. He asserts that factor (1) was inapplicable because "all of his prior convictions are misdemeanors and only one of those involves potential injury to another person." He contends that factor (8) was inapplicable because, although he violated the conditions of his previous probationary sentence, "the only instances of noncompliance with probation were minor driving offenses." The petitioner has failed, however, to support either argument with citation to authorities. In consequence, he has waived our consideration of this issue. *See* Tenn. R. App. P. 27(a)(7) ("The brief of the appellant shall contain . . . [a]n argument . . . with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on"); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Moreover, it is well settled that misdemeanor convictions may support the imposition of factor (1), *see, e.g.*, *State v. Jeffrey A. Burns*, No. M1999-00873-CCA-R3-CD, slip op. at 4 (Tenn. Crim. App., Nashville, June 2, 2000), and that any pretrial or presentencing violation of probation, no matter how slight, may support the application of factor (8), *see, e.g.*, *id.*, slip op. at 5.

The petitioner also argues that even if factors (1) and (8) are applicable to his convictions, the trial court assigned too much weight to them. Prior to the 2005 amendment, Tennessee Code Annotated section 40-35-401 allowed an appeal on grounds that "[t]he enhancement and mitigating factors were not weighed properly, and the sentence is excessive under the sentencing considerations set out in § 40-35-103." T.C.A. § 40-35-401(b)(2) (2003). The 2005 amendment removed this provision. *See State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008). In addition, the 2005 amendment to Tennessee Code Annotated section 40-35-114 provides that the trial court "shall consider, but is not bound by" the enhancement factors, rendering them advisory in nature. *See* T.C.A. § 40-35-114. Given these statutory provisions, this court is not free to consider on appeal the defendant's claim that the enhancement factors were not weighed properly.

B. Consecutive Sentencing

The petitioner also contends that the trial court erred by ordering that three of his aggravated robbery sentences be served consecutively. He asserts that his criminal history is "simply not extensive enough to justify consecutive sentencing in this case." He also argues that although the record supports the trial court's conclusion that he was on probation at the time he committed the offenses in this case, the trial court should not have imposed consecutive sentencing on the basis of this factor in the absence of the findings required by *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995). The State submits that consecutive sentencing is appropriate based upon both the petitioner's criminal history and his committing the offenses while on probation.

When a defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of seven categories listed in Tennessee Code Annotated section 40-35-115. They are:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
> (2) The defendant is an offender whose record of criminal activity is extensive;
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
> (6) The defendant is sentenced for an offense committed while on probation; or
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b) (2006). The existence of a single category is sufficient to warrant the imposition of consecutive sentences, *see State v. Adams*, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997), and indeed, "[e]xtensive criminal history alone will support consecutive sentencing," *id*. In *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995), the supreme court imposed two additional requirements for consecutive sentencing. The court must find that consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. *Id.* at 938 ("[T]he provisions of Section 40-35-115 cannot be read in isolation from the other provisions of the Act. The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender."); *see State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002) ("In addition to the specific criteria in Tenn. Code Ann. § 40-35-115(b), consecutive sentencing is guided by the general sentencing principles providing that the length of a sentence be 'justly deserved in relation to the seriousness of the offense' and 'no greater than that deserved for the offense committed.'" (citations and footnote omitted)). *But see State v. Lane*, 3

S.W.3d 456, 461 (Tenn. 1999) (approving Court of Criminal Appeals holding "that *Wilkerson* is limited to cases involving consecutive sentencing of 'dangerous offenders'").

In the present case, the trial court ordered consecutive sentencing based upon its finding that the petitioner's record of criminal activity "is extensive, not only by his convictions but all the other activity that was involved in this situation" and that "he's sentenced for an offense committed while on probation." The trial court noted that it "did not have to find the *Wilkerson* factors" but nevertheless concluded that "the consecutive sentences . . . reasonably relate to the severity of the offense, and it's necessary in order to protect the public from further serious criminal activity by this defendant." The court elaborated, "Clearly the continued armed robbery of vulnerable citizens in our community is something that requires consecutive sentences." The record supports each of these conclusions.

The presentence report established that the petitioner had prior convictions for driving on a suspended license (four times), assault, and casual exchange. In addition to these convictions, the defendant, in the sentencing hearing, admitted his willing participation in a robbery spree that spanned nearly four months and included several more robberies than those to which he pleaded guilty. Further, the record confirms, and the petitioner concedes, that he was on probation for convictions of assault and casual exchange when he committed the offenses in this case. Based upon these factors, the imposition of some consecutive sentences was appropriate in this case. Accordingly, the sentencing decision of the trial court is affirmed.

II. Denial of Post-Conviction Relief

The petitioner contends that the trial court erred by denying his petition for post-conviction relief. He specifically claims that he was denied the effective assistance of counsel. The State asserts that the denial of relief was proper because the defendant failed to establish his claims by clear and convincing evidence. We agree with the State.

The post-conviction petitioner bears the burden of proving his or her allegations by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The error must be so serious as to render an unreliable result. *Id.* at 687. It is not necessary, however, that absent the deficiency, the

trial would have resulted in an acquittal. *Id.* at 695. Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

In this case, the petitioner contends that his trial counsel performed deficiently by failing to call co-defendants Frierson and White as witnesses at his sentencing hearing. The petitioner insists that "he relied on the promise of his attorney that he would call his co-defendant's [sic] to testify as to his involvement at the sentencing hearing." The post-conviction court, however, concluded that the failure to call these witnesses did not amount to deficient performance. The court found that the petitioner's own testimony at the sentencing hearing presented "the information about how he would perform the patdowns on the victims and was not the individual using the gun." The court also found that "even though [the petitioner] felt there was a difference between simply being the pocket man in the robbery and being the one holding the gun," the petitioner's actions as a "pocket man" and getaway driver were sufficient to support his convictions under a theory of criminal responsibility. The post-conviction court specifically accredited the testimony of trial counsel that he explained the theory of criminal responsibility to the petitioner.

Although the petitioner complains that his trial counsel performed deficiently by failing to call co-defendants Frierson and White as witnesses at the sentencing hearing, the petitioner did not present either witness at the evidentiary hearing. Moreover, no other evidence instructs us as to what testimony either witness would have provided. "When a [post-conviction] petitioner

contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Generally, presenting such witnesses in the post-conviction hearing is the only way a petitioner can establish that "the failure to discover or interview a witness inured to his prejudice . . . or . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner." *Id.* Accordingly, even a petitioner who establishes that trial counsel deficiently performed by failing to investigate or call witnesses is entitled to no relief "unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." *Id.* at 758. In the absence of this evidence, the petitioner has failed to establish that the failure to call the co-defendants as witnesses at the sentencing hearing inured to his prejudice and is, therefore, not entitled to post-conviction relief on this claim.

Accordingly, the judgment of the post-conviction court denying post-conviction relief is affirmed.

III. Corrected Judgments

Finally, although the trial court, at the sentencing hearing, ordered that the sentences for counts 17 and 18 be served concurrently to each other and to count 16, the judgment forms for counts 17 and 18 indicate that the sentences for those counts are to be served concurrently to each other and consecutively to count 16. When there is a conflict between the transcript and the judgment form, the transcript controls. *See, e.g.*, *State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); *State v. Jimmy Lee Cullop, Jr.*, No. E2000-00095-CCA-R3-CD, slip op. at 14 (Tenn. Crim. App., Knoxville, Apr. 17, 2001) (remanding for correction of sentence alignment in judgment form to conform to alignment reflected in transcript). Assuming that the transcript reflects the intended sentence, the judgment forms for counts 17 and 18 should be corrected.

IV. Conclusion

Because the record supports the trial court's application of the enhancement factors and the imposition of consecutive sentencing, we affirm the sentencing decision of that court. In addition, because the petitioner has failed to establish his ineffective assistance of counsel claim by clear and convincing evidence, we affirm the denial of his petition for post-conviction relief. Finally, because the judgment forms for counts 17 and 18 conflict with the sentencing hearing transcript, we remand the case to the trial court for the correction of these judgment forms.

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JAMES CURWOOD WITT, JR., JUDGE